

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 7506

Petition of Telephone Operating Company of )  
Vermont LLC, d/b/a FairPoint Communications, )  
for waiver of certain requirements under the )  
Performance Assurance Plan and Carrier to )  
Carrier Guidelines )

Order entered: 8/6/2009

**ORDER RE: WAIVER OF PERFORMANCE ASSURANCE PLAN  
AND CARRIER-TO-CARRIER MEASURES**

**I. INTRODUCTION**

On March 25, 2009, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint Communications"), requested that the Vermont Public Service Board (the "Board") waive certain requirements of the Performance Assurance Plan ("PAP") and the Carrier-to-Carrier Guidelines Performance Standards ("C2C"), so as to remove certain of FairPoint Communications' reporting and performance obligations under the PAP and the C2C. FairPoint argues that such a waiver is necessary as its new operating systems are not capable of generating the information associated with the specific standards — an outcome that FairPoint asserts was outside of its control.

The Department of Public Service ("Department") and several competitive local exchange carriers ("CLECs")<sup>1</sup> oppose FairPoint's waiver petition. These parties argue that FairPoint has not shown that the change to the operating system was outside of FairPoint's control.

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1. Comments were filed by One Communications ("One Comm"), segTEL, Inc. ("segTEL"), National Mobile Communications Corp., d/b/a Sovernet Communications ("Sovernet"), and Comcast Phone of Vermont, LLC ("Comcast").

In this Order, we deny FairPoint's motion for a waiver. FairPoint has failed to show any basis on which we could conclude that the waiver is due to circumstances outside of its control. To the contrary, the design of its new systems, and their ability to produce the reports necessary to comply with the PAP and C2C standards, was FairPoint's responsibility and FairPoint had a duty to ensure that those systems enabled it to meet regulatory mandates.

## **II. BACKGROUND**

In addition to the retail services FairPoint provides to its end-user customers, it also provides wholesale services to CLECs through a combination of unbundled network elements ("UNEs") and resale of its retail services at a discount. As early as 1996, we concluded that FairPoint's predecessor, Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"),<sup>2</sup> needed to provide such services in order to facilitate telecommunications competition without requiring other carriers to duplicate FairPoint's network. We also put in place the C2C standards and the PAP to set up wholesale performance benchmarks for FairPoint. These were designed to monitor a full range of wholesale services, including pre-ordering, ordering and maintenance and repair.

The C2C standards contain a significant number of very specific performance indicators and benchmarks. The PAP uses the C2C standards, but converts a subset of them into a self-enforcing mechanism designed to ensure that FairPoint offers high-quality services to its competitors.<sup>3</sup> The PAP was adopted in 2002 in conjunction with Verizon's request to the Federal Communications Commission ("FCC") for permission to offer interstate long-distance services originating in Vermont. The Public Service Board concluded that it should support Verizon's petition, but only if it simultaneously adopted the PAP (which Verizon had proposed) that would require Verizon to compensate its competitors when wholesale service quality fell below defined benchmarks or was worse than the service Verizon provided itself.

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2. At the end of March 2008, FairPoint acquired Verizon's local exchange assets in northern New England, including Vermont. At that time, FairPoint assumed all of Verizon's obligations associated with local exchange services.

3. We do not have a precise count of the number of performance measures that FairPoint must report on under these two requirements, but even if we granted FairPoint's waiver petition, a substantial number of metrics would remain.

As part of FairPoint's acquisition of Verizon's local exchange assets, FairPoint became responsible for Verizon's obligations to provide services to CLECs and meet the standards under the C2C standards and PAP. In its petition and testimony, FairPoint made specific commitments to comply with the PAP; the conditions we adopted as part of our approval explicitly required that FairPoint would be subject to the PAP.

From April 2008 through the end of January 2009, FairPoint continued to use Verizon's operational support systems to provide significant aspects of its service, including billing functionality and wholesale support. At the end of January, however, FairPoint cutover from Verizon's systems to its own, newly developed ones. According to FairPoint, this involved moving from Verizon's over 600 systems to FairPoint Communications' approximately 60 systems. FairPoint now provides retail and wholesale services using these new systems; it no longer has access to the systems that were previously used to provide services.

### **III. FAIRPOINT'S REQUEST**

As a result of the transfer of operations to its own systems, FairPoint contends that it can not report the results of certain measures. Accordingly, FairPoint now seeks a permanent waiver of certain metrics in the C2C standards and PAP. Specifically, FairPoint requests a permanent waiver of the reporting requirements and associated penalties for a significant number of metrics. The metrics and reasons for the waiver request are described below.

- For certain Pre-Ordering metrics and one Maintenance and Repair metric that the PAP and C2C standards evaluated based upon parity with comparable retail results, FairPoint asserts that it can no longer generate results for retail performance necessary to conduct the parity analysis. FairPoint proposes to substitute benchmarks (with performance measures) in lieu of the parity measures until one year of actual system performance data is available for evaluation, at which point permanent benchmarks would be established.
- The PAP and C2C require reporting of certain pre-ordering wholesale transactions performance and Interface Availability, based upon multiple interfaces which existed for CLECs to process transactions with the Verizon systems. The new systems have only three interfaces: Web/GUI, eWPTS and WISOR. FairPoint requests the Board

change the reporting requirements so as to only require FairPoint Communications to report results for these three systems.<sup>4</sup>

- FairPoint's systems are not structured to capture two other reports, for which FairPoint requests a waiver of reporting and penalty provisions.<sup>5</sup>
- FairPoint asserts that it has no data available for certain metrics because CLECs in Maine, New Hampshire and Vermont either do not order the services associated with these metrics or do not process their orders in the manner the metric contemplates.<sup>6</sup>
- The Board granted Verizon permission to remove metrics related to line splitting and line sharing from the C2C in 2006. However, consideration of the removal of PAP metrics related to these offerings was delayed pending the resolution of the FairPoint acquisition. FairPoint contends that it developed its systems without the capability to report data regarding line sharing and line splitting in the PAP. FairPoint requests

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4. The following metrics are affected by this change:

- Metric Number PO-2, OSS Interface Availability
- Metric Number PO-1-01, Average Response Time- Customer Service Record
- Metric Number PO-1-02, Average Response Time- Due Date Availability
- Metric Number PO-1-03, Average Response Time- Address Validation
- Metric Number PO-1-04, Average Response Time- Product and Service Availability
- Metric Number PO-1-05, Average Response Time- Telephone Number Availability and Reservation
- Metric Number PO-1-06, Average Response Time- Mechanized Loop Qualifications- xDSL
- Metric Number PO-1-07, Average Response Time- Reject Query
- Metric Number PO-1-09, Parsed CSR

5. The reports for which FairPoint asserts information is now unavailable are the following:

- MR-1-05, Average Response Time- Trouble Report History (by TN/Circuit)
- OR-3-02-1000, Percent LSR Resubmission Not Rejected

6. The following metrics fall into this category:

- Metric Number OR-1-08, Percent On Time ASRC- No Facility Check (Fax/Mail)
- Metric Number OR-1-10, Percent On Time ASRC- Facility Check (Fax/Mail)
- Metric Number OR-2-08, Percent On Time Reject- No Facility Check (Fax)
- Metric Number OR-2-10, Percent On Time Reject- Facility Check (Fax)
- Metric Number OR-13-13523, Percent of Large Job Hot Cut Project Negotiations Completed
- Metric Number PR-1-13-3525, Average Interval Offered-Hot Cuts-No Dispatch
- Metric Number PR-3-12-3531, Percent Completed in 15 Business Days
- Metric Number PR-3-12-3532, Percent Completed in 15 Business Days
- Metric Number PR-3-13-3531, Percent Completed in 26 Business Days
- Metric Number PR-3-13-3533, Percent Completed in 26 Business Days
- Metric Number PR-6-02-3523, Percent Installation Troubles Reported within seven business days
- Metric Number PR-6-02-3525, Percent Installation Troubles Reported within seven business days
- Metric Number PR-9-01-3523, Percent On Time Performance- Hot Cut
- Metric Number PR-9-01-3525, Percent On Time Performance- Hot Cut
- Metric Number PR-9-04-3525, Percent On Time Performance Batch Due Date

the Board waive the requirement to report results and any associated penalties for these metric results.

FairPoint also asks for a temporary, two-month, waiver of eleven metrics for which it asserts that data is not available. According to FairPoint, the data for these metrics is not available for the February and March reports due to systems issues where (1) a lack of data existed due either to the manual processing of orders or the delay in the billing cycle, or (2) programming changes needed to be implemented.<sup>7</sup>

#### **IV. POSITIONS OF THE PARTIES**

FairPoint contends that the waiver is needed due to "circumstances that, as a practical matter," are beyond its control. FairPoint argues that the PAP reporting requirements and metrics were designed to reflect Verizon's 600+ systems. According to FairPoint, under the asset acquisition arrangements, it was required to develop its own systems rather than continuing to rely upon Verizon's. These new systems were "designed for its needs" and reflected the recommendations of its consultant, Capgemini; FairPoint argues that "no amount of planning or preparation could have resulted in systems that continued the legacy reporting requirements and metrics without introducing increased costs and inefficiencies." FairPoint claims that it would have been impractical and highly inefficient to replicate all of Verizon's systems subject to reporting requirements or metrics under the PAP, solely for the purpose of avoiding any change to those reporting requirements and metrics. FairPoint Communications, therefore, submits that the need for a waiver is due to circumstances beyond its control. Furthermore, FairPoint argues

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7. The metrics for which FairPoint seeks a temporary waiver are the following:

- Metric Number NP-1-01-5000, Percent Final Trunk Groups exceeding Blocking Standard
- Metric Number NP-1-02-5000, Percent Final Trunk Groups exceeding Blocking Standard (No Exceptions)
- Metric Number NP-1-03-5000, Number Final Trunk Groups exceeding Blocking Standard-2 months
- Metric Number NP-1-04-5000, Number Final Trunk Groups exceeding Blocking Standard-3 months
- Metric Number OR-6, Percent Service Order Accuracy
- Metric Number OR-11, Percent Resale/UNE-P Provider Notification in Days
- Metric Number BI-3-04, Percent CLEC Billing Claims Acknowledged within two (2) Business Days
- Metric Number BI-9-01, Percent Billing Completeness in 12 Billing Cycles
- Metric Number BI-1, Timeliness of Daily Usage Feed
- Metric Number BI-2, Timeliness of Carrier Bill
- Metric Number PO-3, Percent Answered within 30 Seconds

that the PAP provisions concerning waiver requests should be extended to parity measures where, as here, the waiver is due to unavailability of retail results, rather than a failure to assure that wholesale results are in parity with retail results. Finally, at the prehearing conference, FairPoint recommended that we not rule on its waiver request, but instead hold the motion in abeyance while the parties negotiate a simplified PAP.<sup>8</sup>

The Department opposes FairPoint's petition. The Department argues that the request for a temporary waiver is unsupportable and simply demonstrates that FairPoint failed to "properly implement necessary changes and procedures in a timely fashion."<sup>9</sup> The Department also contends that the request for a permanent waiver is: (1) facially deficient, because it does not demonstrate that the circumstances were beyond FairPoint's control; (2) impermissibly seeks relief of reporting requirements rather than failure to meet performance standards; and (3) actually represents a rewriting of the PAP by FairPoint. However, the Department maintains that we should not dismiss FairPoint's petition because FairPoint raises some legitimate issues; specifically, the Department asserts that if FairPoint is correct that certain performance measures apply to systems that are not being used or services that are not necessary, there may be little purpose to be gained by mandating continued compliance. The Department recommends that the Board direct the parties to confer and attempt to reach agreement on metrics that should be permanently eliminated from the PAP for these reasons.

One Communications ("One Comm") disagrees with FairPoint's proposal to hold the waiver petition in abeyance. One Comm observes that under the PAP, FairPoint need not make PAP payments or credits after filing a waiver petition based upon circumstances beyond its control. Such a result, argues One Comm, would deprive it and other CLECs the bill credits and payments that they might otherwise receive. One Comm also opposes the waiver petition on its merits, asserting that it conflicts with sworn statements made to the Board by FairPoint witnesses prior to receiving approval of the acquisition in which FairPoint said it would not seek a waiver of the PAP. One Comm stresses that FairPoint reiterated this statement less than three months

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8. The development of a simplified PAP was proposed by FairPoint in the context of its acquisition of Verizon's assets and accepted by the Board. Neither we nor FairPoint specified when such a modification would occur.

9. DPS Comments at 2.

before the cutover to the new systems which created FairPoint's inability to produce the required data.

One Comm also argues that FairPoint has not demonstrated how "FairPoint's development of its own systems could be characterized as an uncontrollable event."<sup>10</sup> One Comm cites to testimony of FairPoint that it characterizes as demonstrating the fact that FairPoint had control over the new systems and that these systems were a significant benefit of the transaction. One Comm adds that FairPoint promised during the acquisition proceeding that it would comply with the PAP. One Comm also echoes the Department's concern that FairPoint is in effect attempting to unilaterally rewrite the PAP. One Comm also opposes the request for a temporary waiver, citing the fact that the Board already effectively denied the same petition during Docket No. 7270.

SegTel filed a letter concurring in One Comm's comments.

Sovernet also opposes the grant of a permanent waiver, arguing that the sale transaction and design of systems was entirely within FairPoint's control. Sovernet observes that at no time did FairPoint suggest that its new systems would necessitate a revision to the PAP. In addition, Sovernet raises the same concern as the Department and One Comm that the petition actually represents a unilateral proposal to revise the PAP. Finally, Sovernet states that it does not oppose the temporary waivers proposed by FairPoint.

Comcast opposes both a temporary and permanent waiver of the PAP.<sup>11</sup> Comcast argues that the waiver shifts the risk of wholesale service quality to the wholesale customers and away from FairPoint. Comcast also objects to deferring resolution of the waiver request until the streamlined PAP is developed, arguing that the existing PAP should remain in effect until the new PAP is completed. Nonetheless, for the metrics associated with the interfaces between CLECs and FairPoint, Comcast does not oppose FairPoint's proposal to substitute the new interfaces for the existing ones.

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10. One Comm Comments at 6.

11. Comcast did not submit initial comments., but raised these issues in its Reply Comments.

In reply comments, FairPoint states that its waiver petition does not address a failure to meet PAP performance benchmarks, but rather addresses limitations on the availability of information. FairPoint asserts that for 46 of the 71 metrics in its waiver petition, no penalties apply and for the remaining 25 metrics, it has not paid any penalties since it acquired Verizon in 2008. FairPoint also contends that none of the commenting parties have contested the core facts or shown that the circumstances underlying the waiver request were not, as a matter of law, outside FairPoint's control. FairPoint thus asserts that it would be inappropriate to dismiss FairPoint's waiver request since these parties have not shown the absence of a genuine issue of material fact. FairPoint also emphasizes that it would be inefficient to resolve the issues raised by its waiver petition prior to the development of a revised PAP. Finally, FairPoint asks that we reject Comcast's Reply comments because they do not actually reply to any of the initial comments.<sup>12</sup>

## **V. DISCUSSION**

The PAP allows FairPoint to request an exception or waiver on three generic grounds. Two of these are inapplicable to the current circumstances and are not addressed by FairPoint. The third basis on which a waiver can be requested relates to "situations beyond [FairPoint's] control that negatively affect its ability to satisfy only those measures with absolute standards." The PAP states that the absolute standards are based upon normal operating conditions and "do not necessarily establish the level of performance to be achieved during periods of emergency, catastrophe, natural disaster, severe storms, work stoppage, or other events beyond FairPoint's control." Any waiver petition must:

demonstrate clearly and convincingly the extraordinary nature of the circumstances involved, the impact the circumstances had on [FairPoint's] service quality, why [FairPoint's] normal, reasonable preparations for difficult situations proved inadequate, and the specific days affected by the event."<sup>13</sup>

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12. Comcast's Reply Comments largely reiterate points raised by other parties. As a result, we do not need to rule on FairPoint's objection.

13. PAP at 23.

The PAP also specifies that the waiver process is not available for those metrics for which FairPoint's wholesale performance is measured by comparison to retail performance (these are referred to as "parity" measures).<sup>14</sup>

The PAP provides that, following the waiver petition:

The Board will determine which, if any, of the daily and monthly results should be adjusted in light of the extraordinary event cited, and will have full discretion to consider all available evidence submitted. Insufficient filings may be dismissed for failure to make a *prima facie* showing that relief is justified.

We have considered FairPoint's claims and the parties' comments and hereby deny FairPoint's request.<sup>15</sup> We reach this conclusion primarily because we can find no valid basis on which it would be possible to conclude that FairPoint's current inability to collect data on the specified performance metrics and comply with the PAP are outside its control.

Our analysis starts with Docket No. 7270, in which we considered FairPoint's request to acquire Verizon's assets. In that proceeding, FairPoint committed to comply with the PAP in Vermont.<sup>16</sup> This commitment was not equivocal; at no point did FairPoint state that its commitment was subject to the condition that it designed systems that could provide the requisite data. Rather, FairPoint's commitment was to comply — period. In fact, the Department specifically recommended that we adopt the PAP and freeze it in place until we adopt a successor PAP. FairPoint agreed to this condition. FairPoint also specifically agreed to adopt the existing C2C standards.<sup>17</sup> Our final order approving the acquisition embodied these commitments in specific conditions. Condition 73 states that:

FairPoint shall adopt and be subject to the Performance Assurance Plan ("PAP") that now applies to Verizon in Vermont. FairPoint shall adhere to the applicable PAP and Carrier-to-Carrier Guidelines in Vermont and shall be subject to the potential penalties and enforcement mechanisms set forth in those documents.

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14. PAP at 23.

15. We could also dismiss FairPoint's petition for failure to make a *prima facie* showing that relief was justified. However, as we find that, even if we accepted all of FairPoint's factual assertions as accurate, we could not grant the requested relief, we make an affirmative ruling in this Order.

16. Docket 7270, Order of 12/21/07 at 219.

17. Docket 7270, Order of 12/21/07 at 220.

The terms and conditions of the PAP shall remain in effect and applied to FairPoint until the Board orders a successor PAP. FairPoint has agreed not to challenge the Board's jurisdiction to enforce the PAP.<sup>18</sup>

Combined, FairPoint's commitment and our condition created a binding obligation on FairPoint to meet both the C2C standards and the PAP. Although not explicitly mandated, of necessity, this established an obligation for FairPoint to design its new systems to provide the data necessary to meet this condition; only by producing this data could FairPoint possibly ensure that it had complied with its obligations. We cannot understand how FairPoint could design a system that would meet its C2C and PAP compliance commitment without providing the measurements that were essential to evaluate such compliance. Because of this, we find FairPoint's instant petition untenable.

We also can find no rational basis on which to conclude that the result of the newly-designed systems was outside of FairPoint's control. It was FairPoint that agreed to meet the C2C and PAP standards. As we explained above, FairPoint thereby undertook the duty to ensure that its systems were designed accordingly. Quite obviously, this did not occur. We have no basis on which to conclude why this occurred. It is possible that FairPoint failed to convey the appropriate design specifications to its consultant, Capgemini. It is also possible that Capgemini designed the systems without ensuring that they could provide the necessary data. We do not need to determine which scenario is correct; it is clear that, relative to the conditions imposed by this Board, the obligation to ensure compliance rested with FairPoint, in which case it had the responsibility to convey appropriate design specifications to its contractor and then oversee the contractor's performance so that FairPoint could comply with the standards. From the standpoint of compliance with our conditions, the responsibility to exercise control over the outcome rests with FairPoint.<sup>19</sup>

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18. Docket 7270, Order of 2/15/08 at 54.

19. We take no position on the allocation of responsibility between FairPoint and Capgemini for the many problems with the operational support systems, including those that produce the data necessary to comply with the C2C standards and demonstrate compliance with the PAP. This is not an issue before us. Our ruling places responsibility on FairPoint for ensuring that it, its employees and contractors, and its agents comply with our mandates.

We, therefore, conclude that FairPoint does not qualify for a waiver under the terms of the PAP. This conclusion also derives from the specific terms of the PAP. As the Department argues, the PAP permits waiver of payment amounts arising from *results* that were caused by events outside of FairPoint's control. It has no mechanism for a waiver simply because FairPoint no longer can generate the data necessary to assess compliance. In fact, the PAP rests on the assumption that such data would exist.

We also reject FairPoint's request for a waiver of parity measures. The PAP is explicit that the waiver mechanism is not available where the measures that are exceeded are parity measures. This is for obvious reasons: the waiver mechanism is based upon poor results and it is difficult to envision an event outside of FairPoint's control that would lead to a disproportionate affect upon CLECs using the same systems that FairPoint uses for its own services.

Our denial of FairPoint's waiver request does not fully resolve this proceeding. Our Prehearing Conference Memorandum accepted FairPoint's proposal to work with CLECs and other northern New England states on a revised, simplified PAP. FairPoint has circulated an initial proposal and, as we understand it, is working on a modified proposal. That work should proceed in this docket, which will continue to be treated as non-contested for purposes of the PAP revisions.

Of more immediate concern is the fact that our denial of FairPoint's waiver does not correct the underlying problem that led to the petition: FairPoint's systems cannot now generate all of the information necessary to comply with the C2C standards and the PAP. FairPoint has, without asking for a modification of our Orders, presented us with a *fait accompli*, essentially modifying the C2C standards and PAP unilaterally by failing to develop its systems to meet the requisite standards. Under any standard, this failure was FairPoint's fault, but we still must address the effects of FairPoint's actions.

FairPoint's waiver petition also highlights the fact that some revision to the PAP and C2C standards may be appropriate, although FairPoint employed the wrong mechanism for accomplishing it. For example, the C2C standards and PAP still measure performance of the pre-ordering system for interfaces that Verizon used but that FairPoint does not employ. The

PAP needs to reflect the new systems. In addition, FairPoint observes that a number of the metrics address UNEs that have not been ordered in northern New England.<sup>20</sup>

Except for the Department's suggestion that we direct the parties to negotiate the possible elimination of some metrics, the parties' comments do not tell us how we should address these problems going forward. The Board, therefore, requests that parties file comments on how we should proceed in this docket. In particular, the parties should address (1) what to do about the fact that FairPoint's systems cannot now generate the necessary data, (2) whether we should direct parties to negotiate PAP revisions to address the changed interfaces ahead of the broader effort at PAP simplification, and (3) whether there are other PAP changes that could or should be negotiated separate from the PAP simplification. Parties shall file these comments by August 21, 2009.

**SO ORDERED.**

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20. This issue appears to be non-critical and can be addressed as part of the simplified PAP.

Dated at Montpelier, Vermont, this 6<sup>th</sup> day of August, 2009.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: August 6, 2009

ATTEST: s/Susan M. Hudson  
Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)*